IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 12 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BHIMRAO BABURAO

Versus

STATE OF GUJARAT

Appearance:

MS SUBHADRA G PATEL for Petitioner

MR SAMIR J DAVE, APP, for Respondents

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 09/02/2001

ORAL JUDGEMENT

#. The petitioner is a convict and sentenced to suffer RI for life by the learned Sessions Judge, Ahmedabad under Section 302 IPC on 22nd August, 1984. The petitioner made an application to the Government for his due furlough leave on 1st of October, 2000. This

application was rejected by the Government of Gujarat under the order dated 3.1.2001. Hence this petition under Article 226 of the Constitution.

#. This matter was admitted on 10.1.2001. The respondent No.1 filed affidavit-in-reply. In paragraph No.3 thereof it is stated that the petitioner was involved in triple murder case. In paragraph No.4 it is admitted that the petitioner applied for furlough leave on 3rd of October, 2000 which was rejected by the State Government. Rule 4 of the Bombay Furlough and Parole Rules, 1959 has been reproduced in paragraph 4. In paragraph No.5 of the reply it is stated that the Home Department vide letter dated 13.12.2000 called for the opinion from the Deputy Commissioner of Police, Zone V, Ahmedabad City for considering the furlough application of the petitioner. The Home Department on the opinion of this Police officer, it is allegedly found that the convict petitioner is involved in triple murder case and he is a head strong person and complainants are also residing nearby the present petitioner's area and therefore there are all possibility of breach of peace if the present petitioner prisoner is released on furlough leave. It is stated that in view of the report of the Deputy Commissioner of Police, Zone V, Ahmedabad City, who has not recommended for granting furlough leave to the present petitioner convict, the State Government has rejected the application on 22.12.2000 and the decision has been communicated to the petitioner. A reference has been made to the fact that in past when the petitioner prisoner was released on parole leave for seven days, he had absconded for 1211 days and thereafter he was arrested by the police authority. Summing up the pleadings in paragraph 5, it is stated that in view of the said facts and circumstances of the case, the petitioner is not entitled to get any relief as prayed for in the application and the application is required to be dismissed.

#. Learned Counsel for the petitioner submitted that furlough is a right of prisoner as conferred to him under the Rules aforesaid and this right cannot be denied to him only on ipsi-dixit of the authorities concerned. It is stated that Rule 4 provides for categories of prisoners who shall not be considered for release on furlough and a prisoner who have defaulted in any way in surrendering himself at the appropriate time after release on parole or furlough though fall under this category, but even in case of this prisoner the furlough or parole leave are being granted. To buttress this contention, learned Counsel for the petitioner cited the

petitioner's own case. It is urged that after the late surrender by the petitioner he has been granted many times the furlough and parole leave. If this late surrender was not considered a ground to deny this benefit to the petitioner in past, how it can be said to be a ground germane to this case. It is next contended that the State Government has rejected the application of the petitioner in this case only on the ground of adverse Police report. The copy of the police report has not been given to the petitioner and any reliance placed thereon to pass the adverse order against the petitioner by the respondent State is not in consonance with the principles of fair-play and natural justice. In her submission, where any adverse material is used to pass an order denying right of furlough leave to the petitioner, that material has to be supplied to him and should have been given an opportunity to make his representation. That precisely has not been done in the present case. Lastly it is contended that the whole approach of State Government in the present case is perverse. This order appears to have been passed on extraneous and irrelevant consideration.

#. In contra Shri Samir Dave, learned AGP contended that Rule 4 of the Rules aforesaid empowers the authority concerned not to accept the request of the prisoner to release him on furlough leave where the police has not recommended his release. The reference is made to Clause 4 of Rule 4 of the Rules aforesaid. It is next contended that petitioner is a dangerous person and he is involved in a triple murder case and since he is a very head strong person in the nearby locality where the complainants are residing, his release is not considered to be in the larger interest of the public and this Court may not interfere in the matter. Lastly it is contended that the police report needs not be supplied to the petitioner. The report has to be called for the satisfaction of the authority and in fact and substance it does not form a part of the procedings and a document of which copy has to be furnished to the petitioner prisoner. Referring to the Rules aforesaid, Shri Dave, learned Counsel for the respondents submitted that there is no provision to furnish a copy of the adverse police report to the prisoner.

#. I have given my thoughtful consideration to the submissions made by the learned Counsel for the parties.

#. Rule 3 of the Rules aforesaid gives a right to the prisoner of the category provided therein to be granted furlough leave for the period for which they are

entitled.

#. Rule 4 of the Rules aforesaid lays down the category of prisoners who shall not be considered for release on furlough leave. In all, eleven categories are there. The case of the petitioner does not fall under the categories No. 1, 2, 3, 5, 6, 7, 8 and 11. Category No.4 enumerates the prisoners whose release is not recommended by the police on the ground of public peace and tranquility. Category 9 provides that in the category of prisoners mentioned therein, their case of furlough leave has to be referred to the State Government. Clause 10 enumerates the prisoners who have defaulted in any way in surrendering themselves at appropriate time on release of parole or furlough.

#. In reply to the special criminal application, and para-5 thereof, grounds which prevailed with the authority not to release the petitioner on furlough are given. These grounds are taken on the basis of the opinion of the police authority. These are as follows:

(i) Home Department found that the convict prisoner is involved in triple murder case.

(ii) He is a head strong person.

(ii) The complainants are also residing nearby the petitioner's area and there are all possibilities of breach of peace if the present petitioner is released on furlough.

#. Another ground which has been taken into consideration is that in the past when the petitioner-prisoner was released on parole leave of seven days, he absconded for 1211 days and thereafter he was arrested by the police authorities.

##. In the special criminal application in para-3 thereof, it is stated that the petitioner enjoyed many times parole and furlough leaves. It is admitted that in past at one occasion, the petitioner late surrendered but thereafter he enjoyed many times parole and furlough leaves and surrendered before the jail authorities in time. It is stated that lastly he enjoyed 40 days parole leave from 4-8-2000 to 22-9-2000 and he surrendered in time without untoward incident before the jail authorities.

##. Learned counsel for the petitioner was directed to give out the details of the period for which in past the

petitioner has been given benefit of the parole and furlough leaves by the respondents. She has given handwritten list yesterday and the matter was kept today for the verification of the list by the learned counsel for the respondents.

##. Shri H.H. Patel, learned counsel for the respondent submitted that the details in the list furnished by the counsel for the petitioner are correct. The petitioner was released on parole on 6-10-1985 for a period of seven days but he had not surrendered in time and ultimately arrested by the police and brought to jail on 8-2-1989. So there is late surrender by 1211 days. After this late surrender, the petitioner has been granted many times parole leave, the details of which are as under:

PERIOD	DAYS	REMARKS
17-2-1994 to 26-2-1994	10	Surrendered in time.
11-2-1995 to 13-2-1995	03	"
24-5-1995 to 28-5-1995	37	"
23-7-1997 to 3-8-1997	12	"
28-10-1997 to 3-12-1997	37	"
20-2-1998 to 18-3-1998	27	"
17-2-1999 to 1-3-1999	15	"
2-4-1999 to 23-5-1999	52	"
3-10-1999 to 22-10-1999	20	"
30-3-2000 to 5-4-2000	05	"
11-8-2000 to 22-9-2000	40	"

##. After, 1989, the petitioner has been granted furlough leaves as many as eight times and the detail of which are as under:

PERIOD	DAYS	REMARKS
15-9-1994 to 28-9-1994	14	Surrendered in time.
21-1-1996 to 3-2-1996	14	"

28-2-1996 to 12-3-1996 14 "

22-9-1996 to 5-10-1996 14 "

8-7-1997 to 21-7-1997 14 "

17-6-1998 to 16-7-1998 14+16 "

24-1-1999 to 15-2-1999 14+ 09 "

10-9-1999 to 23-9-1999 14 "

##. Rule 4 of the Rules aforesaid though disentitle a prisoner to avail of the furlough leave where earlier he late surrendered after parole or furlough leave over but is not an absolute rule which denies once for all this benefit to the prisoners. This is not taken to be an absolute bar to grant furlough leave where earlier the prisoner surrendered late after parole or furlough leave by the Government and its Officers. This is clear from the facts of this case itself. The petitioner was late surrendered after furlough leave granted to him in the year 1985 by 1211 days and thereafter he was granted as many as eight time furlough leave. Not only this, many a times, parole leave has also been granted. These facts conclude the issue that it is not absolute bar that after late surrendering or at once having been late surrendered, the prisoner disentitles himself once for all for parole and furlough leave. It depends on the facts of each case. It may be a ground for denying the benefit of furlough in a given case but it cannot be taken to be a rule and in fact was not taken absolute bar by the State Government and its Officers also.

##. This matter can be looked into and considered yet from another aspect. Late surrender after parole and furlough leave is a jail offence and for which the prisoners are being punished. Though it is not brought on the record by either of the parties, but for late surrender by the petitioner after parole and furlough leave granted to him in the year 1985, he certainly would have been punished. There is all possibility that next furlough leave would have been ordered to be forfeited. For late surrender, one of the punishments which is normally given is forfeiture of due furlough. Once for this late surrender, due furlough has been forfeited then this rule may not be taken to be an absolute bar or a disability for the prisoner concerned. In the presence of these undisputed facts, the ground given for late surrender in past by the petitioner for rejection of his application by the State of Gujarat is wholly irrelevant

and an extraneous consideration. The fact that after late surrender as many as eight times furlough leave has been granted and he has also been given benefit of the parole for many times, it is a matter where the action of the respondent-State to make use of it as a ground for rejecting the application of the petitioner is perverse and arbitrary.

##. From affidavit in reply and the impugned order in this special criminal application I find that as the police reported adversely against the petitioner, this furlough leave was not granted to him. Clause (4) of Rule 4 of Rules aforesaid lays down that a prisoner whose release is not recommended by the police on the ground of public peace and tranquility may not be entitled for furlough. The police report has not been produced on the record of these proceedings by the respondents. It does not form a part of the reply filed by the respondents to the special crimina application. So this court is not in a position to look into, go through and appreciate the police report. Otherwise also, from the affidavit filed in the reply, it is very difficult to accept in the absence of the police report, what the deponent averred is correct or not. The averments made in the affidavit are verified to be true to the best of the knowledge of the deponent's, information and belief. So it is not clear whether the averments made in para-5 of the special criminal application are true to the best of the knowledge of the deponent or information or belief. Even it is not stated that he made this statement after verifying the record. From the affidavit it is very doubtful whether this deponent what to say the authority who made the order has gone through the contents of the police report or not. In the absence of this statement of fact, only inference can be drawn that the deponent has not gone through this police report. Whatever, he averred in para-5 of the reply is also difficult to be accepted as it is not specified these averments are whether true to his knowledge or information or belief. On such defective affidavit, the Court cannot place reliance. It is dangerous to rely upon such an affidavit and more so in the matters where question of deprival of right conferred upon the petitioner-prisoner under the Rules does arise for consideration of the Court. In a case where the State of Gujarat, a Welfare State, come up to oppose the petition where prisoner is making request to the court for his release on furlough, its action should have been fair, reasonable and in consonance with the principles of fairplay and natural justice. It's officers have to be very specific, clear and emphatic what they averred. In a case where a fact has to be

established and proved to the satisfaction of the Court which is borne out from the document, then that document itself has to be produced rather than to make an oral statement.

##. Strictly the rule of evidence may not be applicable to the proceedings under the Article 226 of the Constitution, it is always beneficial to the Court as well as the litigants where a fact has to be proved by a document and that document is also available to prove thereof, then document itself has to be produced in the proceedings. In this case, document i.e. police report has not been produced and the respondents made statement on affidavit of contents of the document, which is difficult to appreciate. Not only this, affidavit which is filed is not in conformity with the requirement of law, it is a defective affidavit and it is dangerous to rely upon it. Police report where it is adverse to the prisoner and it is made use of by the authority concerned to deny him the benefit of furlough leave, the same has to be furnished to the prisoner concerned. He has to be afforded an opportunity to make his representation against that report and thereafter the authority concerned to take a decision in accordance with law in the matter which falls under Clause (9) of Rule 4 of the Rules aforesaid. The decision has to be taken by the State Government in respect of the prisoner who falls under that class for his furlough leave and the police report has to be analysed and after recording its own satisfaction, appropriate order has to be passed. In case the State Government acts on the police report blindly then the police will have a veto in these matters and this provision as contained in clause (9) of Rule 4 of the Rules aforesaid will be rendered nugatory. The State Government being a welfare State all of its action should be fair, impartial and in consonance with the principles of fairplay and natural justice. In this case, this principle has not been followed by the Welfare State and it has blindly followed and relied upon the police report, copy of which has not been given to the petitioner and he has not been given any opportunity to make his representation and this order has been passed. In a case where the State Government has to rely upon the police report, copy of that report has to be given to the prisoner concerned and representation has to be called thereupon and then to take decision accordingly. This decision taken in the present case is against the basic principles of fairplay and natural justice. Though in this case, I have not been called upon to decide while dealing with the application filed by the prisoner of the category who falls under clause (9) of the Rule 4 of the

Rules aforesaid, the State Government exercising quasi-judicial or administrative powers, even if it is taken to be a case where the State Government exercises administrative powers, it is not gainsay that the order passed in exercise of administrative powers, if adversely affects the right of the citizen, the principles of natural justice have to be followed before making the same. Here, in this case, this order of the State Government results in denial of right given to the prisoner under the Rules aforesaid and this has been done relying on the police report, which is adverse to the petitioner and copy of which has not been given to him nor any opportunity to make representation against it. It is a settled law that even while passing administrative orders which adversely affects the civil right of the citizen, any material used against the party concerned, the copy of the same has to be made available to him/her and further to grant him/her an opportunity to make his/her defence against the same. In this case, the order passed by the respondent-State suffers from this defect and it cannot be allowed to stand.

##. Otherwise also, on merits, this order is difficult to be maintained by the Court. The reason given that the petitioner is a convict and involved in triple murder case, it is suffice to say that it is absolutely an extraneous consideration, at this stage, in the matter. If this consideration is relevant and germane to the matter, how far it is justified by the State Government to extend the benefit of furlough leave eight times earlier to the petitioner as well as parole leave many times to him also. This ground if is a valid ground, it is equally applicable in the earlier applications filed by the petitioner for parole and furlough leave. Moreover, in the Rules it is not made a ground to deny benefits of furlough leave to this category of prisoner.

##. Another ground given that he is a head strong person, is again an extraneous consideration which has been made use for rejecting the application of the petitioner. Earlier also, the petitioner was granted furlough leave for eight times and parole leaves for 17 times and all the times, the petitioner reported in time and no untoward incident has been reported against him. How he has been taken to be a head strong person, in these facts, it is a matter in support of which, nothing has been produced on the record by the respondents. In the facts of this case, it is difficult to accept the police report that the petitioner is a head strong person.

##. Next ground given that the complainants are also residing nearby the petitioner's area and there are all possibilities of breach of peace if he is released on furlough is yet another piece of extraneous consideration made by none other than a welfare State. As stated earlier, eight times on furlough leave and seventeen times on parole leave, the petitioner was released. It is not the case that at that time, the complainants were residing elsewhere. Earlier also they were residing nearby the petitioner's area and at that time, there was no breach of peace, how it can be taken to be a case of possible breach of peace, if the petitioner is released on furlough this time. I am constrained to observe that this police report appears to have been procured one so that the petitioner may not get this benefit of furlough leave. From the facts of this case, it is clearly borne out that this order has been passed for some extraneous consideration. In case the matter would have been considered fairly, impartially and in consonance with the justice oriented approach certainly none of the ground which has been taken for denying the furlough leave to the petitioner would have been accepted.

##. As a result of the aforesaid discussion, this petition succeeds and the same is allowed and the order dated 3-1-2001, annexure `A' is quashed and set aside. The respondents are directed to allow the petitioner to go on furlough leave, however, subject to the conditions which are legally permissible to be imposed. Rule is made absolute.

##. It is a fit case where the petitioner has to be awarded costs as but for this perverse order there would not have been occasion for the petitioner to approach this Court. Litigation in this court heavily costs. The petitioner is a prisoner and he has to file this petition by engaging an advocate and he has incurred expenses under the head of paying fees to the advocate, court fees and other incidental expenses of filing of the petition. Learned counsel for the petitioner submitted that she has charged very nominal fees from the petitioner. So far as other expenses are concerned, it also may also not be less than Rs.500/-. The respondent-State of Gujarat is directed to pay Rs.1000/- as costs of this petition to the petitioner.

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